

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3 CIVIL ACTION 12-CV-5994-KM

3 SERGEI ALEYNIKOV, : TRANSCRIPT OF PROCEEDINGS
4 : M O T I O N
5 Plaintiff, : Pages 1 - 55
6 -vs- :
7 GOLDMAN SACHS GROUP, :
8 Defendant. :
9 - - - - -

9 Newark, New Jersey
10 October 22, 2012

10 B E F O R E: HONORABLE KEVIN McNULTY,
11 UNITED STATES DISTRICT JUDGE

12 A P P E A R A N C E S:

13 MARINO TORTORELLA & BOYLE, P.C.
14 BY: KEVIN H. MARINO, ESQ.
15 Attorney for the Plaintiff

16 BOLES, SCHILLER & FLEXNER, LLP
17 BY: MATTHEW W. FRIEDRICH, ESQ.
18 Attorney for the Defendant

19 _____
20 Pursuant to Section 753 Title 28 United States Code, the
21 following transcript is certified to be an accurate record as
22 taken stenographically in the above entitled proceedings.

22 S/Mollie Ann Giordano
23 MOLLIE ANN GIORDANO
24 Certified Court Reporter
25 (973-220-9465)

1 THE COURT: Good afternoon.

2 MR. MARINO: Good afternoon.

3 THE COURT: Before I start, Mr. Marino, is the
4 pronunciation Aleynikov?

5 MR. MARINO: That's correct, your Honor.

6 THE COURT: Thank you. We are here today for argument
7 on an application for a preliminary injunction in Aleynikov
8 versus The Goldman Sachs Group, Inc. That is civil number
9 12-5994.

10 May I have appearance of counsel.

11 MR. MARINO: Good afternoon, your Honor. Kevin H.
12 Marino, Marino Tortorella & Boyle for the plaintiff, Sergei
13 Aleynikov.

14 MR. TORTORELLA: John Tortorella from Marino,
15 Tortorella & Boyle for Sergei Aleynikov.

16 MR. BOYLE: John Boyle from Marino, Tortorella & Boyle
17 for Sergei Aleynikov.

18 THE COURT: It's Marino Tortorella & Boyle.

19 MR. MARINO: We have the whole operation here.

20 MR. PEARLSON: Good afternoon, your Honor. Ross
21 Pearlson from the law firm of Wolff & Samson, on behalf of
22 defendant Goldman Sachs Group, Inc. And it's my pleasure to
23 introduce on my left, Matthew Friedrich, who's from the law
24 firm of Boles Schiller & Flexner, who's been admitted pro hoc
25 vice. And on my right Jonathan Shaw of the same firm.

1 THE COURT: Welcome to town, gentleman.

2 Okay. Well, plaintiff, it's your burden, why don't
3 you start off.

4 MR. MARINO: Thank you, very much, your Honor.

5 Your Honor, because in our view this case turns
6 entirely on the Court's interpretation of the Goldman Sach
7 Group's by-laws, and a couple of provisions of the by-laws,
8 I've taken the liberty of enlarging the relevant provision.
9 And with the Court's permission, I'll turn then around and make
10 sure that counsel can see them as well.

11 THE COURT: This is a reproduction of stuff that's in
12 the record?

13 MR. MARINO: Yes, that's correct, your Honor.

14 THE COURT: Alright. Okay.

15 MR. MARINO: We are looking, your Honor, at a
16 provision of the amended and restated by-laws of the Goldman
17 Sachs Group, Inc., Articles 6 miscellaneous 6.4.

18 THE COURT: I may ask you just to move that chair?

19 MR. FRIEDRICH: I have it.

20 THE COURT: Thanks.

21 MR. MARINO: Can you see that all right, your Honor?

22 THE COURT: Sure.

23 MR. MARINO: So this provision is entitled Section
24 6.4. It's entitled: Indemnification. The corporation shall
25 indemnify to the full extent permitted by law, any person made

1 or threatened to be made a party to any action by reason of the
2 fact that such person was an officer of a subsidiary of the
3 corporation. Expenses, including attorney's fee incurred by
4 any such person in defending any such action, suit or
5 proceeding shall be paid or reimbursed by the corporation
6 promptly upon demand by such person. And if any such demand is
7 made in advance of the final disposition of any such action,
8 suit or proceeding, promptly upon receipt by the corporation of
9 an undertaking of such person to repay such expenses, if it
10 shall ultimately be determined that such person is not entitled
11 to be indemnified by the corporation. The section includes the
12 rights provided to any person by this by-law shall be
13 enforceable against the corporation by such person who shall be
14 presumed to have relied upon it in serving or continuing to
15 serve as a director or officer, or in such other capacity as
16 provided above.

17 The second enlarged copy is also from the
18 indemnification section of Section 6.4, and it reads --

19 THE COURT: Counsel, please feel free to walk around,
20 if you need to.

21 MR. MARINO: Thank you very much, your Honor.

22 It reads: For purposes of this by-law, the term
23 subsidiary shall mean any partnership or other entity in which
24 the corporation owns directly or indirectly a majority of
25 economic or voting ownership interest. The term "officer" when

1 used with respect to the corporation shall refer to any officer
2 elected by or appointed pursuant to clauses 3 and 4 of Section
3 4.1 of these by-laws. And when used with respect to a
4 subsidiary or other enterprise that is not a corporation, or is
5 organized in a foreign jurisdiction, the term "officer" shall
6 include, in addition to any officer of such entity, any person
7 serving in a similar capacity or as the manager of such entity.

8 The last provision I'd like to draw the Court's
9 attention to is this 4.1 that's referred to in this Section
10 6.4. And 4.1 teaches, with respect to officers, election or
11 appointment, in addition, the order of directors at any time
12 and from time to time may elect one or more chairman of the
13 board and/or one or more vice chairman of the board from among
14 its members. Two, one or more chief executives officers, one
15 or more presidents and/or one or more chief operating officers.
16 Three, one or more vice presidents, one or more treasurers,
17 and/or one or more secretaries. And/or four, one or more other
18 officers in the case of each of one, two, three, and four, if
19 and to the extent the board deems desirable. In addition, the
20 Board of Directors at any time and from time to time may
21 authorize any officer of the corporation to appoint one or more
22 officers of the kind described in clause 3 and 4 above. So
23 those are the provisions that I respectfully submit govern the
24 proceeding before your Honor.

25 The entire case turns on whether Mr. Aleynikov was an

1 officer within the meaning of Goldman Sachs Group's by-laws and
2 we just looked at them. If he was, then he's not only entitled
3 to relief on this order to to show cause, but he's entitled to
4 the ultimate relief on summary judgment. Every other fact,
5 that is to say, every single fact necessary for the Court to
6 decide this motion for summary judgment has been established.
7 There's no need for discovery of any kind. Mr. Aleynikov was
8 an officer of a subsidiary of the Goldman Sachs Group that was
9 not, or is not a corporation. Mr. Aleynikov, and this is
10 undisputed, was a vice president of Goldman Sachs & Company,
11 Incorporated.

12 It's also undisputed that Goldman Sachs & Company,
13 Incorporated is a subsidiary of the Goldman Sachs Group, and a
14 capital S subsidiary within the meaning of the by-laws. And
15 the notion that -- and my sense from all of the argument that's
16 been submitted by counsel in this case, and all the submissions
17 that counsel have made, my sense is that they want this Court
18 to conclude that there's some sort of factual dispute over
19 whether Mr. Aleynikov, as a vice president of a subsidiary that
20 is not a corporation of the Goldman Sachs Group, Inc., was an
21 officer within the meaning of the by-laws. It is abundantly
22 clear by the plain meaning of the words that a vice president
23 is an officer, and this is not something that happens by
24 accident. People don't become vice presidents of corporations
25 like Goldman Sachs & Company by accident.

1 THE COURT: I'll let you go on, but let me ask you one
2 clarifying question, Which is in the papers. I have seen
3 things to the effect that he was vice president of some
4 informal division. Is that inaccurate, he is a vice president
5 of GS company?

6 MR. MARINO: It is undisputed that Sergei Aleynikov
7 was vice president of Goldman Sachs & Company, and that Goldman
8 Sachs & Company, which, yes, they do -- I believe the word used
9 is affiliate. They loosely referred to it being an affiliate
10 of Goldman Sachs Group. Just so this is clear, it is
11 undisputed that Aleynikov was a vice president of Goldman Sachs
12 & Company. That Goldman Sachs & Company is a subsidiary of the
13 Goldman Sachs Group. And a particular type of subsidiary, a
14 subsidiary that is not a corporation. It is undisputed that
15 Goldman Sachs & Company was and is a limited partnership,
16 bringing it squarely within the meaning, if I may, your Honor
17 of Section 6.4,

18 THE COURT: A non-corporate sub.

19 MR. MARINO: And you can see, it's quite specific.
20 They talk about what subsidiary means with respect to the
21 corporation and that Cap C corporation, although it's not
22 defined in the by-laws, I believe it's undisputed, it refers to
23 the Goldman Sachs Group. So the first category is
24 subsidiaries. When the term "officer" is used with respect to
25 the part of the corporation, it refers to any officer elected

1 by or appointed pursuant to clause 3 and 4. Those are the
2 sections that I've drawn out. Those are Sections 1, 2, 3, and
3 4. It clearly includes a vice president, an officer. The
4 officers of the Goldman Sachs Group, Inc., clearly include vice
5 presidents of the Goldman Sachs Group, Inc.

6 The second category, with respect to --

7 THE COURT: Actually, let me just stop you for one
8 moment there and ask Mr. Friedrich a question. This is not the
9 case, but if it were the case that the plaintiff were a vice
10 president of the parent corporate entity, would we have a
11 dispute here?

12 MR. FRIEDRICH: If he were appointed in the manner
13 that is prescribed by Section 4.1, that is to say formerly
14 appointed as a vice president, we would not have a dispute
15 here.

16 THE COURT: Okay, thank you.

17 MR. MARINO: So, we have the three categories, and the
18 second category is, those who are officers of subsidiaries that
19 are corporations.

20 THE COURT: Uh huh.

21 MR. MARINO: And the third category is the one that
22 pertains to here. When used with respect to a capital S
23 subsidiary or other enterprise that is not a corporation, or is
24 organized in a foreign jurisdiction, the term "officer" shall
25 include, in addition to any officer of such entity, any person

1 serving in a similar capacity, or as the manager of such
2 entity.

3 THE COURT: This is where I run into a little bit of
4 trouble in interpretation. Just because the -- and I
5 realize -- I'm not hanging the drafting on you or your client,
6 you didn't draft it. But for a category C, it says officer
7 means officer.

8 MR. MARINO: That's right.

9 THE COURT: And also some other things.

10 MR. MARINO: That's right. And the cases that have
11 interpreted by-laws that make no effort, unlike the Goldman
12 Sachs by-law, that make a careful effort to define officer
13 elsewhere, right, when they're talking about -- as you just
14 asked Mr. Friedrich, when they're talking about officers of the
15 corporation, Goldman Sachs Group, they're quite specific about
16 what an officer is.

17 THE COURT: That's my point.

18 MR. MARINO: Right. But when they get down here in
19 6.4, they don't define officer. They use the word. I would
20 suggest to your Honor that you certainly could construe that to
21 take the meaning that is ascribed to it here, but that's not
22 what we ask the Court to do.

23 THE COURT: Well, not to interrupt you, he said,
24 interrupting you. I thought you were arguing that C
25 incorporated the 4.1 categories.

1 MR. MARINO: No, we are not. The 4.1 categories are
2 here for the Court's understanding of what Goldman Sachs Group
3 generally meant when they used the word "officer". When they
4 went out of their way to define it. They defined it expressly
5 to include vice president. And I think that is constructive.
6 And I think -- yes, I think it's sloppy draftsmanship. And
7 your Honor indicated quite correctly under the law that that's
8 not laid at the doorstep of Mr. Aleynikov. More than that,
9 under the applicable principal of law of contra -- Mr.
10 Tortorella will be able to to say this.

11 MR. TORTORELLA: Prefendum

12 MR. MARINO: Contra preferendum. It is construed
13 adversely to the drafter. The reality is, everybody knows when
14 we call you vice president, we mean you're an officer. And
15 when we say we are going to indemnify our officers, we sure
16 mean to include vice presidents. And the reason I think, your
17 Honor -- I think this is abundantly clear because of the effort
18 they make to add, and you notice that I've double emphasised
19 this provision for you. I've highlighted and underlined it.
20 The term "officer" shall include, in addition to any officer of
21 such entity, any person serving in a similar capacity or as the
22 manager of such entity, meaning to get indemnification. Now,
23 Goldman Sachs argues that this is a limited part. I quite
24 disagree with that. This is in fact a limiting or enlarging --

25 THE COURT: Limiting or enlarging. You're not

1 claiming it applies at all, are you?

2 MR. MARINO: No. I don't think that's any part of the
3 discussion here. They are talking about engaging, and asking
4 your Honor to engage in a functional analysis of what Mr.
5 Aleynikov did. They're saying he was one in 2000. They're
6 saying Mr. Aleynikov didn't even have any people that reported
7 to him. He wasn't in the scope of things. They didn't say it
8 in just this way. He was a small fish. Mid-level employee.
9 Certainly not an officer, as they're now defining it. Right?
10 But the reality is, Sergei Aleynikov by hint of the fact that he
11 was given the title vice president, was an officer within the
12 meaning of these by-laws. And that's the plain meaning. And
13 what the cases that have interpreted and ruled upon similar
14 arguments have said, if you want officer to mean something
15 other than its plain meaning, define it specifically, limit it,
16 otherwise --

17 THE COURT: Okay. Well, let me tell you another one
18 of my concerns, which is this. I know or I think I know what
19 an officer of a corporation is. I know or I think I know what
20 a vice president of a corporation is. I always thought in a
21 financial sector that casts a pretty wide net. I don't know
22 what a vice president of a limited partnership means. That has
23 no settled meaning I know my mind anyway.

24 MR. MARINO: There are many, many cases that have
25 interpreted that language. They're not always limited to the

1 corporation. That is to say, not all of those cases arise
2 within the context of construing the term "vice president" or
3 officer in those terms. In the context of something that has
4 the corporate form. They are repeatedly, everyone understands
5 that a vice president is an officer.

6 When you look at the cases, they don't say everybody
7 knows that in the corporate parlance, a vice president is an
8 officer. See, they're trying -- what Goldman Sachs is trying
9 to do is to escape its clear obligation to indemnify Mr.
10 Aleynikov in this case to attach some sort of additional
11 requirement on the officer or vice president of a limited
12 partnership. This is silly. The reality is, the term
13 "officer" shall include, in addition to any officer or such
14 entity, anyone serving in a similar capacity. It means there's
15 a list of people, right, that are officers, and then there are
16 the functional officers. Those who, even though they're not
17 officers, and we know in an investment house the partners are
18 called, for the most part, managing directors, who I assume for
19 the most part, managing director, there are some managing
20 directors who would say "I'm a managing director and I head
21 global equities. I supervise all these people."

22 THE COURT: To me, at least, I'm willing to be
23 persuaded otherwise. The reason for that final clause is
24 obvious, in a similar capacity. This is the catch all for all
25 kinds of entities. Some of them even organize under foreign

1 law, who wouldn't have names of officials that correspond to
2 the names of officials, corporate entities, or anything else.
3 It seems to me you've got to have that in there. If there is a
4 person who's running the show and who's appointing people, and
5 so on --

6 MR. MARINO: And you want to indemnify them.

7 THE COURT: And signing on behalf of the corporation,
8 entity, and making policy decision and so on, that that person
9 would come within it. I don't see what that has to do with
10 this case.

11 MR. MARINO: What it has to do with this case is I
12 believe there is, by adding that, okay, what they are doing is
13 telling you that that subset of people that your Honor has just
14 described, I believe accurately, is not a substitute for the
15 officer within the plain meaning of that word. That is a group
16 that's in addition to those who occupy the position of officer.
17 So that Goldman couldn't come in later and say: John Smith,
18 who's our global head of equities and supervises a thousand
19 people, and earns a hundred million dollars a year, he's just
20 been indicted, and he's coming in looking for advancement.
21 We're not going to give John Smith advancement. After all,
22 he's not an officer. How do we know he's not an officer? This
23 is the question. He's not a vice president.

24 THE COURT: Right.

25 MR. MARINO: Exactly. But the point is, if everybody

1 who occupied the title, a title, and they're not -- they're not
2 a thousand of them, president, vice president, treasurer,
3 secretary, and chairman of the board, chief executive officer,
4 that's it. You're in one of those categories. You're an
5 officer, and everybody knows it, and that's why -- this is why
6 when your Honor -- I take your meaning when you say it doesn't
7 have anything to do with this case. Yeah, it doesn't have
8 anything to do with this case to the extent that Mr. Aleynikov
9 is not such a person. He's not a person who says he served in
10 a capacity similar to an officer --

11 THE COURT: I think you acknowledged in your papers,
12 right, that he's not signing documents on behalf of the
13 corporation. He's not supervising people.

14 MR. MARINO: That's correct. He doesn't argue that he
15 is. He's not arguing for advancement for indemnification under
16 this catch-all provision. That obtains for entities that do
17 not have vice presidents. He works for an entity that does
18 have vice presidents, and he's one of them. And that he has
19 1,999 colleagues, all of whom are entitled to indemnification
20 and advancement, doesn't prove any point, whatsoever.

21 THE COURT: By the way, again, the clarification, I
22 think the 2000 figure.

23 MR. MARINO: It's for everybody.

24 THE COURT: Is it for everybody? Just the entity.

25 MR. MARINO: I think it's not for this entity. I

1 think they say --

2 THE COURT: By this entity --

3 MR. MARINO: I know they say there are 2000 in
4 equities, but I can't be sure. The answer is, they -- we have
5 no reason to dispute it, or basis to dispute it. Say they have
6 quite a few people who have the title "vice president".

7 THE COURT: Do you know, how many people are in GS
8 Company that they called vice president?

9 MR. MARINO: I don't have the answer to that
10 question.. I assumed arguendo it's quite a few people. And
11 it's not of any moment in my view because at the end of the
12 day, think about it this way. Why would you use a term like
13 "officer" in a way that so clearly suggests that you, the
14 draftsman, assumes everybody knows what you're talking about,
15 if the phrase isn't to be accorded its plain meaning, and
16 that's what the cases have said. The cases have said, and
17 we've cited them all to your Honor, and I will go through them
18 in more detail. The case have said a vice president is an
19 officer. And if the drafters of the by-laws wished for a vice
20 president -- I beg your pardon, wished for an officer to be
21 defined other than according to its plain meaning, they should
22 have defined the term other than according to its plain
23 meaning. By their very use of the word "officer" in a way that
24 by anyone's likes suggests they think we all know what they're
25 talking about. I mean, it's not complicated. The term

1 "officer" shall include, in addition to any officer, such
2 entity, any person serving in a similar capacity, either
3 they're referring back to 4.1, and that's how you're supposed
4 to know what an officer is where they go to the trouble with
5 respect to the Cap C corporation, Goldman C Group, to define
6 officers to include a specific group --

7 THE COURT: I don't see how it can, it doesn't have a
8 chairman of the board. How could those apply?

9 MR. MARINO: Perhaps I haven't been clear with your
10 Honor. What I'm suggesting is not that this provision pertains
11 to Mr. Aleynikov's position in a direct fashion. I'm just
12 suggesting that you have one entity, the Goldman Sachs Group,
13 that has chosen to use the word "officer" as though we all know
14 what they're talking about. Okay?

15 Well, in the common parlance, you can go to any
16 dictionary, and you can go to any Circuit, and you can go to
17 many districts throughout this country, and many states,
18 uniformly you will find many cases say that vice presidents is
19 an officer. They are not limited to just corporate entities.
20 You will find no cases, not a single one, saying a vice
21 president is not an officer. So if you just want to go by the
22 fact that they use the term "officer", and then define it with
23 its own word, define it by itself, the term "officer" shall
24 include, in addition to officers, for these purposes, you
25 could -- that seems very clear to me to be an attempt, as your

1 Honor said, to expand the field. To include those who are in
2 entities before that are not officers, called officers, or
3 people called by officer titles --

4 THE COURT: I think maybe we've gotten all we can out
5 of that.

6 MR. MARINO: Okay, that's fine.

7 THE COURT: Tell me something -- I used to hate this
8 question, so don't read anything into it. Your best case in
9 which a vice president of something other than a corporate
10 entity is an officer?

11 MR. MARINO: Best --

12 THE COURT: Your best case, that is.

13 MR. MARINO: Best decision --

14 THE COURT: Decision.

15 MR. MARINO: Best decision.

16 THE COURT: I don't mean scenario, I mean case.

17 I was looking at page 19 of your reply brief. And if my
18 question is driving you crazy, it doesn't have to be the best
19 one. Give me a detail.

20 MR. MARINO: In re: Foot Hills Texas, Incorporated,
21 bankruptcy court in Delaware, 2009. The employees in this case
22 are vice presidents under the plain meaning of the words. A
23 vice president is an officer. Home Store, plaintiff was a
24 former officer of the company when he was employed first as vice
25 president of the business development, and later as executive

1 vice president of business development ads and sales. Brock
2 Key vs. Idaho Department of Corrections --

3 THE COURT: Back up on Foot Hills for a second.
4 That's a corporate entity, no?

5 MR. MARINO: That's a corporate entity. It appears to
6 be a corporate entity.

7 THE COURT: Yeah. And although I'm with you, they
8 found that a vice president was an officer, that's right. But
9 didn't they also say that the mere title of vice president was
10 not determinative, and we've got to look at the surrounding
11 duties and circumstances, and so on.

12 MR. MARINO: You know, your Honor, the answer to that
13 question is no, I think what was going on there was, as -- just
14 as a matter of -- the reason it's cited here is for the
15 proposition that when people are talking about officers and
16 vice presidents, they are talking about the same thing, right?
17 That's --

18 THE COURT: I understand your general point.

19 MR. MARINO: Yeah, yeah. If you think about this, I
20 don't want to quarrel with this the way your Honor's looking at
21 this. If you think about it this way, if the definition of
22 officer -- that the context of a limited partnership such as
23 Goldman Sachs & Company was meant to have a meaning other than
24 its plain meaning, we -- why not define it? And why, if you're
25 the person who accepts responsibility -- and let's think about

1 this for one second, because I believe it goes to -- I believe
2 the test is, what ould a reasonable person, not what the
3 drafters intended, what would a reasonable person, reading the
4 by-law, have concluded that they meant? So I'm a reasonable.
5 Person, I'm about to go --

6 THE COURT: Let me stop you right there.

7 MR. MARINO: I, the hypothetical, am a reasonable
8 person. I'm going to work for a company that's going to have
9 me work on something that they say is so valuable, that in the
10 wrong hands it could be used to manipulate the continuing
11 markets of the whole world. And that's just Sergei Aleynikov,
12 and look at all the other vice president of Goldman Sachs &
13 Company, who we know without having anything of record, are
14 involved in very risky and very dangerous in this day and age,
15 behaviors. They are at risk of being sued. They are at risk
16 of being sanctioned. They are at risk of being investigated.
17 They are at risk of being indicted. The reason, the rights
18 provided to any person by 6.4 shall be enforceable against the
19 corporation by such person who shall be presumed to have relied
20 upon it. In serving or continuing to serve is that it's a
21 really big deal. Now, we're getting into how many angels can
22 fit on the end of a pin. When they say vice president, do they
23 mean vice president of a limited partnership? Does that carry
24 with it by some osmosis process that we mean corporations? Did
25 we not say that? That's what we meant. That's baloney.

1 THE COURT: Well, he's got -- baloney or not, he's
2 got -- when I get to Mr. Friedrich, I'm going to ask him about
3 an officer is an officer, and what that means and why. But as
4 I say, I think we've drawn what we can out of this on your
5 side.

6 MR. MARINO: So what your Honor has said about it, the
7 questions that your Honor has asked about it, you've raised
8 questions about whether, even though Goldman Sachs -- you said
9 you're going to discuss this with Goldman Sachs' lawyer, even
10 though Goldman Sachs obviously uses the phrase in its by-laws
11 as though we all know what it's talking about, when it says
12 officer, even though that happens, let's look at what the rules
13 of statutory construction say. If your Honor were to conclude
14 that there was some ambiguity here, even if you were to
15 conclude, that officer were an ambiguous term. In all the
16 courts I have just averted to have indicated that it's not.
17 That ambiguity would be resolved resoundedly in favor of
18 indemnification and advancement. Mr. Aleynikov did not
19 participate in drafting these by-laws. Twin City Fire vs.
20 Delaware Racing Association is a 2003 Delaware case. Upon
21 finding an ambiguity and a policy exclusion, the Court properly
22 applied the well-accepted contra preferendum principle of
23 construction. Which is that ambiguities in a contract should
24 be construed against the drafter. So similar effect, the
25 Delaware Chancery Court's in 2012 decision in Shifton vs.

1 Morgan. Joseph Holdings our Supreme Court has frequently
2 invoked this doctrine of contra preferendum to resolve
3 ambiguities about the rights of investors in the governing
4 instruments of business entities and so forth.

5 THE COURT: Okay. I'm familiar with that. That
6 maximum this isn't a contract. Assuming, by analogies, these
7 contract principles apply. There's a lot of things you do when
8 you find an ambiguity in a contract, right? You look at the
9 drafting. You look at the negotiation. You look at the
10 surrounding circumstances. You don't just say: This person
11 drafted it, and therefore they lose.

12 MR. MARINO: Well, that's right. You don't just say
13 they lose. But let's get -- I thought your Honor moved quickly
14 past the notion that there might be even the slightest question
15 that principles that normally govern the interpretation of
16 contracts, govern the interpretation of by-laws. Gentile vs.
17 Single Point Financial Delaware 2001. It is a fundamental
18 principle that the rules used to interpret statute, contracts,
19 and other written interest --

20 THE COURT: I didn't mean to blow past that. All I
21 meant was that this is not a situation where your client and
22 the corporation sat down and hammered out --

23 MR. MARINO: That's right. And to -- I believe to my
24 point, your Honor, you take a job as a vice president at
25 Goldman Sachs & Company, and you are presumed -- you're not

1 proven, you relied on it.

2 THE COURT: I understand.

3 MR. MARINO: We're not going to have the back and
4 forth that we normally have. And we're trying to fight about
5 the provision of the contract. And party A says it means this.
6 And party B says it means that you sign on to be a Goldman
7 Sachs Vice President. They're not making these terms up
8 randomly, they're calling you by a traditional officer's title
9 because they want you to know it, and because they want the
10 rest of the world to know it, and because you and the rest of
11 the world do know it, and I can assure you, assure you that
12 many of the people who occupy this position at Goldman Sachs,
13 were they not given that level of respect, and were they not
14 paid commensurate with it, would not be at Goldman Sachs very
15 long.

16 The truth of the matter is, it's not a complicated
17 story. Goldman Sachs knows, I suspect, because Goldman Sachs
18 indemnifies lots of Goldman Sachs & Company vice presidents,
19 and advances money to lots of Goldman Sachs & Company vice
20 presidents. And assuredly if they prevail, as Mr. Aleynikov
21 did here, those people get indemnified. Try to think with your
22 Honor on this. The question in my mind is, how could it ever
23 be the case that I, as a person going to work for a Goldman
24 Sachs type entity that has these by-laws, and these are the
25 ones they published, right. They don't publish any of this

1 other information that we're hearing about. Well, we're going
2 to -- we really meant to cover just the really top level people
3 at the corporation, or just the very top level people at some
4 of these other entities. What we do is have these processes,
5 where we have a corporate resolution. That's all great --

6 THE COURT: Let me ask you about that, Mr. Friedrich
7 is about to argue. To know who an officer is, it's not invalid
8 to look at the documents that constitute the governing
9 principles of GS Company. And one of them is this memorandum
10 of agreement that tells you if you're an officer, you were
11 appointed by a certain manner and by a certain party.

12 MR. MARINO: Your Honor, did I miss that? Cause I
13 don't see anything in the partnership agreement that says you
14 can tell you're an officer because you were appointed by this
15 process. I don't think that's what that agreement says.

16 I think the point -- the point that I'm trying to make
17 with your Honor is this. The fact that Goldman Sachs chose to
18 adopt a formal procedure for how it appoints the senior most
19 officers of the corporation, to me is of entirely no moment,
20 and of no help in determining what the by-laws mean when they
21 say, very clear, an officer gets indemnified. They don't say
22 an officer who is appointed by formal resolution. They don't
23 say an officer who occupies really a sort of super officer
24 position. Someone who's elevated above everyone else, who
25 holds the officer title. Either one accepts the notion that

1 officer means vice president. Whether you're in a corporation,
2 or a limited partnership, or your local boy club. You are a
3 VP. You're an officer. That's why they use that phrase. To
4 me, you could definitely decide that you want to sit down and
5 have a long and involved, and very interesting, intellectual
6 exercise about what some hypothetical drafter might have meant
7 in some hypothetical jurisdiction when he or she used the word
8 "officer", but I would suggest that that would be directly
9 contrary to the law that the Court is enjoined to apply, which
10 is what's the plain meaning of the word? The plain meaning of
11 the word is officer. Do you know how we know it's the plain
12 meaning? Because when the drafter drafted the by-laws that
13 they acknowledged governed this proceeding, they used it
14 without any effort to define it at all.

15 THE COURT: Okay. Let me -- I'll give you another
16 chance to talk. You've got the burden here.

17 MR. MARINO: I have a lot more. I have a lot more to
18 say.

19 THE COURT: I don't doubt it. I want to hear from Mr.
20 Friedrich. I think a little back and forth might illuminate
21 this.

22 Mr. Friedrich, if you're more comfortable at counsel
23 table, that's fine.

24 MR. FRIEDRICH: Your Honor, I'd like to hand up some
25 demonstrative slides as well. These are notebook format. If I

1 may hand them up to the Court's clerk, I'll take the podium.

2 THE COURT: Alright.

3 MR. FRIEDRICH: So we'll start with the proposition
4 that the Court has already anticipated --

5 THE COURT: For the record, I take it you've given
6 this to Mr. Marino as well?

7 MR. FRIEDRICH: Yes. Since the Court has anticipated
8 very many of arguments, I'll be speaking less than I would have
9 otherwise.

10 Let me start, if I could, in tab 2, the parties, your
11 Honor, effectively agree on what the question is before the
12 Court, and that is; namely, whether or not Sergei Aleynikov,
13 solely by virtue of his job title, was an officer of Goldman
14 Sachs & Co. To be clear, throughout this argument I'm going to
15 talk about Co. which is Goldman Sachs Company, a New York
16 limited partnership, and Goldman Sachs Group, Inc., which is
17 the parent company, a Delaware corporation. The summary of our
18 argument, your Honor, once the rhetoric is stripped away, there
19 is no basis on which to conclude that Sergei Aleynikov was an
20 officer of Co. As a factual matter, Aleynikov was not an
21 officer of Co. Unrebutted affidavits that are before the Court
22 establish that Co. had a formal process for appointing its few
23 officers, all of whom were members of the senior most
24 management of the partnership. He was never appointed through
25 that process. We don't have to guess about who the officers of

1 the partnership were because the partnership kept a list of
2 them.

3 THE COURT: Okay. Could I just interrupt you for one
4 second. About one minute ago Mr. Marino said: No, I averted
5 to the memo of agreement, is it called?

6 MR. FRIEDRICH: Yes, your Honor.

7 THE COURT: And your argument that indeed there was a
8 particular process by which you can figure out who's been
9 appointed as an officer. Try to illuminate me. What's the
10 nature of the disagreement?

11 MR. FRIEDRICH: The nature of the disagreement --

12 THE COURT: Is that you're right and he's wrong, I
13 know.

14 MR. FRIEDRICH: I was trying to frame it more
15 eloquently. I'll try again. It's simply that there's a
16 process, your Honor hit it right on the head. You looked at
17 the portion of 6.4 that Mr. Marino put up that talks about
18 officer being defined differently by entity. It is defined
19 differently for non-corporate subsidiaries precisely because of
20 the dynamic your Honor identified. This is a large
21 organization. It can have subsidiaries in multiple
22 jurisdictions subject to the different laws, with different
23 parameters. Notably, the by-laws did not provide a uniform
24 definition of officer as across all different aspects of the
25 organization. It had to allow, because of the nature of this

1 business, because the nature of the law and jurisdiction, it
2 had to allow flexibility in terms of how officers are
3 determined. Unsurprisingly, as the matter of both corporate
4 and partnership law, it left to its subsidiaries a classic
5 matter of internal government floors. And that is deciding who
6 its own officers were. And that is not only to its
7 non-corporate subsidiaries, but also its corporate subsidiaries
8 in order to determine for themselves who its officers were.
9 That's a process that the New York partnership Pier Co.
10 followed. That's a process that they used as Co. did, a
11 process of written resolution. So we don't have to guess who
12 the people were that were appointed, we know who they were.
13 And we know that Mr. Aleynikov was never among them. The
14 provision of the partnership agreement, one of the provisions,
15 is the provision of the partnership agreement essentially
16 saying as to officers: Well, while the general partner has
17 certain authorities --

18 MR. MARINO: I'm sorry. Can I have the provision,
19 your Honor?

20 MR. FRIEDRICH: It's cited in our brief.

21 THE COURT: If you won't help him out, help me out.

22 MR. FRIEDRICH: I'll be happy to cite you to the --

23 THE COURT: Are we talking about the memo of
24 agreement?

25 MR. FRIEDRICH: Yes, we are. We are, your Honor. If

1 you'll give me just a moment, I'll grab it.

2 THE COURT: I've got a cover sheet, Exhibit 2. o d

3 MR. FRIEDRICH: While we're pulling it up, your Honor,
4 it's cited at page 15 of our brief.

5 THE COURT: Uh huh. It describes --

6 MR. MARINO: Can we just have the provision? This is
7 the provision on which the case is supposed to turn.

8 MR. FRIEDRICH: Right. So, your Honor, it's page 15
9 of our brief citing the agreement at page 7.

10 THE COURT: Alright. I recall that -- I know the
11 particular parts cited were section -- paragraph 11 or Section
12 11, is that what it is?

13 MR. FRIEDRICH: It's the -- it's page 7, the paragraph
14 at the very top. It's any officer of the partnership.

15 THE COURT: Uh huh.

16 MR. FRIEDRICH: My point is simply this.

17 THE COURT: Article 1, Section 11 of the agreement.
18 Okay, go ahead.

19 MR. FRIEDRICH: Thank you. So it's simply as to that
20 provision. My point is, that the partnership agreement
21 describes certain powers and certain authorities held by the
22 general partner. It then says: Any officer of the partnership
23 shall have full similar power and authority in accordance with
24 the procedures prescribed by the general partner to appoint one
25 or more of the partnerships employees as a partnerships

1 attorney in fact for the purposes of executing and delivering
2 on behalf of the partnership, such documents as may
3 specifically be described in the power of attorney. So
4 appointing such employee or employees and as may relate to a
5 specific transaction you specifically described herein. That's
6 simply one enumerated power that "any officer of Co. had."

7 We know by affidavit of Adam Schlesinger that was
8 submitted to the Court, specifically that was never a power
9 that Aleynikov had. This simply is one further indication that
10 because Aleynikov never had the authority that any officer of
11 the partnership had, by inference he was not an officer of the
12 partnership.

13 THE COURT: Did anyone have it? It says that it will
14 happen in accordance with the procedures described the general
15 partner were any such procedures implemented.

16 MR. FRIEDRICH: That, your Honor, I will have to get
17 back to you on. I believe the answer is yes. But I don't want
18 to guess.

19 THE COURT: Okay.

20 MR. FRIEDRICH: Coming back, your Honor, if I could.

21 THE COURT: Sure.

22 MR. FRIEDRICH: If I could turn to tab 3, we were just
23 discussing critically the by-laws do not use a uniform
24 definition of officer, but construed the term differently with
25 respect to the type of entity involved. Turning to the second

1 page of tab 3, Aleynikov's key argument is he is an officer
2 because 4.1 says vice presidents are officers.

3 I just heard the Court ask Mr. Marino: You're making
4 that argument, aren't you, that 4.1 is what applies here? And
5 Mr. Marino at one point says yes, if you read -- no, they're
6 not. If you read their brief, that is precisely the argument
7 they're making. They are arguing explicitly that 4.1 is the
8 only frame of reference that the by-laws apply for what is an
9 officer. There are two holes with that argument. Number one,
10 from the very start of 4.1, and the language that's underline
11 here, within the second page of tab 3, the Board of Directors
12 shall take such action as maybe necessary from time to time to
13 ensure that the corporation has such officers as are necessary.

14 THE COURT: Yeah, it's phrased in terms of the
15 corporate entity that has a Board of Directors, and so on. I'm
16 with you.

17 MR. FRIEDRICH: There's nothing here suggesting it
18 applies to the partnership.

19 Number two, this does not say that anyone who holds
20 the job title of vice president is automatically an officer.
21 That's why, when the Court asked me when I was seated during
22 Mr. Marino's argument, would we be having a dispute if he was a
23 vice president under this provision. I said carefully if he
24 was appointed under the procedure that was at issue here for
25 the group, no we would not. It's not just a question of title,

1 it's a question of appointment.

2 THE COURT: Let me ask you, though, turning to page 1,
3 the same thing I asked Mr. Marino, which is, what am I to make
4 of the term "officer shall include, in addition to an officer",
5 blah, blah, blah, blah, blah. What am I to make of officer
6 means officer and also some other stuff?

7 MR. FRIEDRICH: It means officer within the meaning of
8 the partnership. It means officer as a matter of the self
9 determination of the partnership. It is up to the partnership
10 to decide for itself again under this flexible structure that
11 the by-laws put in place. It does not put in any uniform rule,
12 nor should it, given the nature of the business and given the
13 nature of its many multiple subsidiaries and different
14 jurisdiction. This means officer as determined by the
15 partnership as a matter of New York partnership law.

16 THE COURT: Okay. If I'm -- just a hypothetical
17 person applying for the job with GS Co., how do I know that, I
18 mean not that I'm anticipating being sued over a job
19 application but how do I know that? How do I know what this
20 means, an officer is an officer? And I might be thinking:
21 Well, I guess they're calling me a vice president. How would I
22 know that I'm not included?

23 MR. FRIEDRICH: Your Honor, again, if we want -- we
24 can talk about what sort of the plain meaning of words are.
25 And I'm happy to answer that question in terms -- but I don't

1 think that you get to that part of the analysis. I don't think
2 you get to the part of the analysis that Mr. Marino suggests.
3 Where it's just from the standpoint of what is the reasonable
4 guy on the street think of this team. As the Court had pointed
5 out, there's a lot that needs to be done first in terms of
6 construing the by-laws, construing them consistently as a
7 matter of by-law interpretation. There are many steps before
8 you get to the question of what a reasonable person thinks. If
9 we're talking about common meaning, they think, as a matter of
10 common usage, they cite this Black Law definition of "officer".
11 As the Court pointed out, that's talking about corporate
12 officer the Black's law definition. We want to talk about
13 common meaning of the word, and what the words mean. Here's
14 some definitions from the Webster's New Word Dictionary.
15 "Officer means anyone elected or appointed to an office or
16 position of authority, and government business, institution or
17 society, et cetera". One indication off the bat, there is a
18 formal element to appointment even as a matter of common
19 meaning. Other dictionaries, American Heritage, defines
20 officer as one who holds an office of authority or trust in an
21 organization such as corporation or government. Oxford
22 Dictionaries: A person holding a a positon of authority,
23 especially one with a commission in the armed service the
24 merchantile marine passenger ship. Cambridge Dictionary: A
25 person who has a position of authority in an organization and

1 one who holds an office of authority or trust such as a
2 corporation or government. What you'll see, your Honor, as
3 well, and I think it bears on that question. Much discussion
4 was made about cases supposedly holding that as a matter of law
5 the title vice president means officer.

6 What we have done, your Honor, I want to discuss that
7 authority as a general proposition, and then I want to discuss
8 it in a little bit more detail. This is at page 1 -- tab 7,
9 page 1 of our notebook.

10 THE COURT: Okay.

11 MR. FRIEDRICH: The first thing that I want to say
12 about the discussion about legal authority, it's not like
13 there's one case on point. It's not like there's one case
14 saying: Interpreting vice president, as a matter of law,
15 Delaware by-laws. Okay, so to the extent that it's any
16 authority at all, your Honor, it's frankly persuasive
17 authority. And you can question how valuable that is. The
18 context of which the courts have opined on this is the context
19 of bankruptcy, in the context of tax, in the context of
20 securities fraud. Even across all those contexts, Mr. Marino
21 provides you one set of cases. And, again, as he started to
22 cite the Court to the Foot Hills case. That case holds
23 exclusively that the mere title of a person does not end the
24 inquiry. What we've done for the Court is we have a notebook
25 for the Court that we highlighted to the Court of the cases.

1 Mr. Marino has cited the Court to this proposition, and we've
2 also prepared for the Court the highlighted cases we have
3 found which bear upon this position. We think that the weight
4 of authority, for lack of a better term, it's a duck. It's a
5 substantive test about what the person did. No court that we
6 have found simply holds as a matter of law, if you have the
7 title of vice president, that ends the inquiry as to whether or
8 not you're an officer. They ask questions like: Does the
9 person have a policy-making capacity? Do they have executive
10 level duties? Were they elected or appointed to serve --

11 THE COURT: Let me ask you this and just interrupt
12 you. I don't want to cut you off. But I get what you're
13 saying about it being a duck test, but doesn't your --

14 MR. FRIEDRICH: Doesn't the phrase --

15 THE COURT: Doesn't your by-laws say, in addition to a
16 person who is an officer --

17 MR. FRIEDRICH: That's correct --

18 THE COURT: Apply a duck test to see if somebody else
19 is an officer.

20 MR. FRIEDRICH: That's correct. And let me tell you
21 what I think is one potential reason for that. I'll answer
22 this. Suppose we can, as we said in terms of the global reach
23 of this large company, they have a subsidiary that is located
24 in Sweden. I don't know what Sweden law says. Let's say, as a
25 matter of local jurisdiction, you can only have one or two

1 officers. So, there may be other people who are officers who
2 don't count as officers under local law. And this construction
3 is a way of reaching people who may otherwise need to be
4 covered. I don't think that the fact that there is -- that
5 that language is there is meant to somehow foreclose
6 consideration of a person's duties among the definition of
7 officer. Because at the end of the day, that's what an officer
8 is. That is among the most important decisions that any
9 partnership makes, is who its leadership is. It's the people
10 vested with policy-making authority. It's the people vested
11 with leading the organization. It's the people who are vested
12 with the authority to make business risk. And let's, as we
13 think about that, your Honor, let's not forget about what the
14 Delaware Chancery Court has articulated in terms of the policy
15 behind 145, which Mr. Marino started to allude to at the end.
16 It is about making sure that good people serve. And if you
17 read the particulars of Judge Strine's opinion in Fasciana,
18 what he writes it is about making qualified officers and
19 directors serve, particularly from the standpoint of their
20 willingness to accept, realize, make judgments about, and
21 execute upon business risk because that is what companies are
22 all about. That's what the economics are all about. That is
23 the sole of the 145 indemnification and advancement scheme.
24 That principal, your Honor, has no application here,
25 whatsoever. Sergei Aleynikov was never authorized to take

1 business risk on behalf of Goldman Sachs. He never did so. He
2 supervised no one. He managed no one. He had no authority
3 whatsoever to transact business outside of Goldman Sachs. That
4 alone should have given a reasonable person that indication he
5 was not an officership --

6 THE COURT: I understand that he wasn't trading or
7 doing any of those Goldman Sachs things. But he -- for want
8 of a better term, sorry. But he was doing activities that
9 could have potentially enormous ramifications.

10 MR. FRIEDRICH: He was described as someone who held a
11 mid-level position as a computer programmer. In terms of could
12 he have done things that could have enormous ramifications, I
13 think that has to be relative in comparison to everyone else.
14 And the Court has affidavits from the HR personnel at Goldman
15 Sachs. We know as a relative matter, vice president is
16 somewhere below managing director, somewhere above post
17 analyst, an associate is a mid-level title. Certainly below
18 partner, and in a relative sense. Again, I know the -- and I
19 think the importance of sort of the many thousands of vice
20 presidents who are out there again is an industry parlance.
21 And you have this from Greg Palm's affidavit, as a matter of
22 industry parlance, that's a functional title. It's used to
23 denote relative seniority within the industry. It is not
24 something that is used to convey officer status. Certainly
25 Goldman Sachs as never considered and does not consider the

1 perople within Co. or hold that title to be officers, and
2 doesn't treat them as such for any purpose.

3 THE COURT: Let me ask you this. And maybe you don't
4 have these facts at your fingertips, but in case you do. Have
5 vice presidents or to what extent have vice presidents been
6 indemnified or advanced legal cause in the past, either of Co.
7 or the non-corporate subsidiary?

8 MR. FRIEDRICH: I can tell your Honor, my
9 understanding is that as to functional vice presidents, in the
10 situation of Aleynikov, those vice presidents have not been
11 paid advancement as a matter of the mandatory indemnification
12 provisions of the by-laws. As a matter of discretion notably
13 within the by-laws, and we point this out in our brief, there
14 is a provision for permissive advancement of employees. That
15 is a provision from time to time used. The answer to what I
16 hear to be the Court's question, have these fees been paid as a
17 matter of mandatory advancement under the by-laws, my
18 understanding is no.

19 THE COURT: I'll be frank about what I mean. Is if
20 that is a practice of the company, might say more about the
21 meaning of these terms than knowing a post hoc argument in
22 response to somebody you're pretty mad at.

23 MR. FRIEDRICH: Yes, yes, yes, true. Absolutely. And
24 I think, as Mr. Marino correctly points out in his pleadings,
25 it's a matter of what the by-laws were at the time. It's not

1 the case that they can be changed later to exclude someone. We
2 couldn't, you know, later change them today to exclude Mr.
3 Aleynidov. He either is or is not within them at the time that
4 they were drafted.

5 Your Honor, I'd like to -- simply before I forget, I
6 would like to, if I could, hand up the binders that I'm talking
7 about

8 MR. MARINO: We call those unauthorized sur-reply
9 briefs.

10 THE COURT: Are the binders just cases?

11 MR. FRIEDRICH: They're just cases.

12 THE COURT: Cases we got, we won't need them. I
13 appreciate you organizing them for the Court.

14 MR. FRIEDRICH: I would like to read out the case
15 names, if I may.

16 THE COURT: Sure.

17 MR. FRIEDRICH: Thank you your Honor.

18 THE COURT: Let me ask you this, Mr. Marino, would you
19 have any objection to him ripping out the table of contents?

20 MR. MARINO: Are they cases in their briefs?

21 MR. FRIEDRICH: No, they're not, your Honor.

22 MR. MARINO: They're cases we're hearing for the first
23 time today?

24 MR. FRIEDRICH: To be clear, the arguments that
25 they're advancing about vice president means officer as a

1 matter of law was put forth for the first time in their reply
2 brief. These are not cases that we have had time to review.

3 MR. MARINO: We get a chance to reply as the party
4 bearing the burden, and we haven't seen these cases, and we
5 haven't seen these briefs that he'd like to hand up.

6 THE COURT: Here's what I'd like you to do. Give
7 me -- when you get back to your office, give me a two-page
8 letter citing these cases explaining very briefly how you think
9 they're relevant. Mr. Marino, you respond to that telling me
10 why they're not.

11 MR. FRIEDRICH: Thank you, your Honor.

12 THE COURT: Let me just ask you, I sense you're
13 winding down on the merits of the likelihood of success. Could
14 you briefly address the other factors, irreparable harm?

15 MR. FRIEDRICH: In terms of the irreparable harm,
16 balance of equities and so forth, some of this, frankly, your
17 Honor, becomes somewhat circular around the definition of the
18 term "officer". Officer, and I admit that.

19 THE COURT: Sure. Sure.

20 MR. FRIEDRICH: If you take it in terms of what is in
21 the public's interest or the balance of the equities here, what
22 we know, because Mr. Aleynikov Frankly concedes that he's
23 broke. What we know is that any money advanced Goldman is not
24 likely to see again. It is not the case that when Mr. Marino
25 suggests when he cites the financial performance of Goldman

1 Sachs, Inc. as a whole and simply because Goldman Sachs has
2 assets and it's convenient for him to have them, that that
3 somehow is the balance of the equities, that's not the balance
4 of the equities. Again, here, if you come back to the very
5 policy, and the very purported public interest behind 145C as
6 articulated by Chancellor Strong in Vaccina is about getting
7 good people to serve from the standpoint of good business risk
8 and making good business decisions. Mr. Aleynikov, as well as
9 the many thousands of functional officers like him, are not
10 people that fall into that category. They are not of the
11 director and officer level, therefore the public policy
12 implications of this do not apply. It is not in the interest
13 of shareholders or the public, your Honor, for Mr. Aleynikov to
14 be paid fees by his corporate victim. It is not the case --

15 THE COURT: Assuming guilt.

16 MR. FRIEDRICH: I'm sorry?

17 THE COURT: Assuming guilt.

18 MR. FRIEDRICH: Assuming guilt. But I'll say this,
19 your Honor, I do think -- I do think, again, they cite to the
20 Ready case where again Justice Shrine makes that very
21 compelling argument saying: What if, what if what the company
22 imagines is unimaginable is in fact the case, and this person
23 is in fact an innocent man. To us, your Honor, in this context
24 we're in a very different place. Because you have a Second
25 Circuit opinion that went into great detail about exactly what

1 Mr. Aleynikov did, and exactly what the conduct was that was
2 found by the jury. What the Second Circuit said is the conduct
3 found by the jury is conduct that Aleynikov should have known
4 was in breach of his confidential obligation to Goldman and was
5 dishonest in ways that would subject him to sanction.

6 THE COURT: Everyone is entitled to an opinion, and
7 probably the Second Circuit more than most.

8 MR. FRIEDRICH: That's easy to say from a Third
9 Circuit --

10 THE COURT: True. True. Certainly it's not res
11 judicata that this is true. Certainly they're not -- the New
12 York State criminal proceeding is not going to consist of
13 someone reading the findings of the Second Circuit and then
14 sending it to the jury.

15 MR. FRIEDRICH: That's correct, your Honor. That's
16 correct. And I think in terms of the legal meaning, the
17 outcome of that proceeding, I think it has applications in some
18 areas but not others.

19 For example, in terms of success on the merits, I'm
20 not going to stand here and argue that that's not success on
21 the merits as that term is defined by Delaware case law. Okay.
22 That's one thing where it counts. In terms of balance of the
23 public interest, and where we stand now in terms of evaluating
24 the balance of the equities, and what the public policy
25 interests are, I think it's entirely relevant and appropriate

1 for the Court to consider the findings and the commentary of
2 the Second Circuit in that context. Let's not also forget,
3 there's an entire factual record that lays out this conduct.
4 That's not meaningless. It can still have application
5 including in the state court process. For example, as your
6 Honor knows, a witness is not available, but there's at the
7 point that in the rules of evidence that the opponent had the
8 ability to cross examine, that can be directly admissible.
9 It's not nothing, it's something. It's just a question of how
10 it's applied. I'm suggesting that that is appropriate to apply
11 here in the context of the balance of the equities.

12 THE COURT: Not that it's appropriate to consider --

13 MR. FRIEDRICH: Yes. Yes.

14 THE COURT: How about just winding down here. How
15 about the notion that, look, this is not just -- you've got
16 some money and he wants it. He is suffering more than an
17 economic injury here. That is this is not ordinary fungible
18 cash, this is money earmarked for his criminal defense, and he
19 will be denied counsel, or at least counsel of his choice, and
20 counsel who's experienced in the case if I don't find his way?

21 MR. FRIEDRICH: Right, well, one is, obviously there
22 are questions about sort of the straight forward application of
23 the by-laws or not. I don't frankly view it as my client's
24 role to say what his defense is or not. Obviously that's a
25 question between he and his attorneys. All that we can define

1 from the factual record is that Mr. Marino has represented
2 Sergei Aleynikov since 2010. There was no claim for
3 advancement made during that two-year period. Again, even now
4 they've entered an appearance. They haven't waited to enter an
5 appearance in the state court case, they've entered an
6 appearance in the state court case. Whatever their decisions
7 are of the economic deal that they made with Mr. Aleynikov is
8 their. I don't think -- I think that's a far cry from a
9 showing that he's somehow going to be deprived of counsel. He
10 can get a court-appointed counsel, if he wants to. I don't
11 think that that's an issue there in terms of the decision
12 that's now before the Court.

13 THE COURT: Alright. I think I may have discussed
14 certain of the issues and perhaps exhausted you. If you don't
15 have anything further --

16 MR. FRIEDRICH: I do not --

17 THE COURT: Then have a seat and I'll let Mr. Marino
18 rebut.

19 MR. MARINO: What troubles me most, your Honor, is the
20 extent to which a party such as Goldman Sachs to litigation
21 such as this, can so obscure the truth that the Court would be
22 lead, misled, to believe that a partnership agreement that is
23 one hundred percent silent on the issue of definition of a
24 officer, could somehow contain that definition. And what your
25 Honor was misled by, I must respectfully submit, was the

1 affidavits that were submitted by Mr. Palm, quite a senior
2 executive at Goldman Sachs Group, Incorporated, and others to
3 the effect that somehow this memorandum of agreement, this
4 partnership agreement, which I will respectfully refer to as a
5 red herring in this proceeding, somehow it defined what an
6 officer was. And so he gets up and is reading to you from his
7 brief, and I say: Where is it? Where is it in the agreement?
8 I mean, first of all, it's not in the agreement. The same sort
9 of acceptance of the generally understood meaning of the term
10 "officer" that obtains in the by-laws of the Goldman Sachs
11 Group, Inc., obtains in the partnership agreement. There isn't
12 any attempt to do anything else.

13 THE COURT: I'm with you that the partnership, the
14 memorandum of agreement doesn't anywhere say, you know, an
15 officer is defined as, you know, a vice president is defined
16 as. And I don't think that's what he was saying. I think he
17 was saying it identified certain earmarks or qualities that
18 tend to go with one's status as an officer. And he doesn't see
19 those here. Is that a slam dunk argument? No. It's a
20 relevant argument, it seems to me.

21 MR. MARINO: If you look at the provision that he
22 averted to, it says, first of all, it tells you the general
23 partner at the bottom of page 6, last line of the page, shall
24 have full power and authority of all of the partners of the
25 partnership at any time, and from time to time to appoint one

1 or more of the partnership's employees as the partnership's
2 attorney in fact for the purpose of executing and delivering on
3 behalf of the partnerships such classes or categories of
4 documents that maybe described in the power of attorney so
5 appointing employee or employees. Well, that tells us nothing
6 relevant to our issue today. The next sentence, "any officer
7 of the partnership", again, no attempt to define the word,
8 which we are now given to believe means different things to
9 different people at different times and meant something
10 different to Goldman Sachs Group than it means in common
11 parlance.

12 THE COURT: The nature of the argument he's making,
13 any officer of the partnership shall where a neck tie to work
14 everyday, and he's saying: Well, I saw this guy everyday and
15 he never had a neck tie. That's the nature of the argument
16 he's making. He's saying an officer of the partnership.

17 MR. MARINO: What's the authority? What's the
18 authority? How do we know? The general partner shall have
19 full power and authority on behalf of all the partners at any
20 time to appoint one or more employees as the partnership's
21 attorney in fact for the purposes of executing and delivering
22 on behalf of the partnership documents or categories of
23 documents.

24 THE COURT: Well, flip it around. Suppose you had
25 evidence that Mr. Aleynikov did appoint someone, appoint an

1 employee as the partnership's attorney in fact, you would
2 certainly cite that to me as evidence anything to suggest that
3 he was an officer. He's just flipping it around.

4 MR. MARINO: I might cite it to you if they had raised
5 a genuine issue of material fact. I might say: Well, there's
6 a fact issue. If Sergei Aleynikov were trying to establish --
7 were trying to make an argument they would foist upon him a
8 functional argument. That's not my argument.

9 THE COURT: Okay, I understand. I agree with you,
10 that if -- if we accept your strong position, which is that if
11 you call somebody vice president, they're an officer. That's
12 it. And then no evidence is relevant. The mere fact being
13 dubbed vice president --

14 MR. MARINO: But it's not -- it has a little --

15 THE COURT: We're going a little deeper than that.

16 MR. MARINO: Well, the problem with that, your Honor,
17 it has a little bit of a quality of being sort of a little bit
18 pregnant, right, because either you determine as a matter of
19 law that when the drafter of the by-laws said officer they
20 meant something that people would understand, right? It can't
21 be their position that when they said that, they were trying to
22 obfuscate. It can't be their position that when they said
23 that, they were trying to leave themselves flexibility to
24 determine post hoc, who they would deem worthy. And, by the
25 way, that's what this proceeding is about. Mr. Friedrich

1 cannot wait to tell your Honor about what a bad guy Sergei
2 Aleynikov is. In the eyes of the law, Sergei Aleynikov was one
3 hundred percent exonerated of every single offense that he was
4 charged with. And, by the way, one of those offenses, one of
5 those offenses the violation of the Computer Fraud Abuse Act.
6 The Computer Fraud Abuse Act makes it a crime, to make a copy
7 without authorization or to exceed authorized access.

8 THE COURT: Yes, I know.

9 MR. MARINO: And, Judge Coate says he had access to
10 the whole system. And the way they did their work was they
11 made a copy of the system, that part of the system they were
12 working on, and that's from their direct testimony. Mr. Freda
13 was in the courtroom every single day with Goldman Sachs
14 colleagues. And he knows what transpired at the criminal
15 trial. So my point is --

16 THE COURT: Let me slow you down one second. I get
17 it. Who could disagree with that. He's clothed with the
18 presumption of innocence. At the beginning of the criminal
19 trial he's clothed with that. It doesn't go away unless and
20 until he's proved guilty beyond a reasonable doubt. I get
21 that. Everybody gets that. But is it irrelevant for purposes
22 of a civil case that certain evidence has been introduced,
23 certain witnesses have testified?

24 MR. MARINO: Yes. Yes,

25 THE COURT: It is irrelevant?

1 MR. MARINO: Yes.

2 THE COURT: Why?

3 MR. MARINO: It's irrelevant because Sergei Aleynikov
4 was accused of doing something wrong as a matter of criminal
5 law. He didn't incur two and a half million dollars of legal
6 expenses, which he didn't have the slightest hope of paying for
7 because he did does something in the words of the Second
8 Circuit majority opinion that was dishonest, or that he knew
9 would violate a confidentiality provision. I opened to the
10 jury that Mr. Aleynikov had violated his confidentiality
11 provision. In fact, that doesn't mean anything to this
12 proceeding. What we're looking, indemnification on a --

13 THE COURT: I understand. I understand. Let me just
14 stick with it for a second because that is even when a person
15 is clothed in the presumption of innocence, we use acts or
16 evidence of acts in various connections other than to establish
17 guilt. Bail and detention, for example.

18 MR. MARINO: That's right.

19 THE COURT: And so how can you categorically say we
20 can not look at this?

21 MR. MARINO: Because he's not cloaked with the
22 presumption of innocence, Judge, he's exonerated. He went to
23 hell for a year, in large measure, because of the conduct of
24 Goldman Sachs in misrepresenting exactly what he took, and what
25 it could do and did do in Goldman's systems. He went to jail

1 for a year for a crime he didn't commit. During that entire
2 time, Sergei Aleynikov, unlike his former colleagues that run
3 Goldman Sachs, is a person of principal. He says: You know
4 what, I'm not going to seek indemnification advancement now
5 because what will happen if I'm convicted and I can't pay it
6 back? What will happen?

7 THE COURT: Nothing, probably. Right?

8 MR. MARINO: It depends on what means nothing and what
9 means something to you. If you're a person of principal, not
10 the criminal that we hear described in this courtroom, if
11 you're a person of principal, you think if I'm unable to pay it
12 back, I'm unable to pay it back, then I've got something that
13 the law says I'm not entitled to. Okay. Sergei Aleynikov was
14 acquitted, and he'll be acquitted again, I promise. You can
15 quote me. What the Second Circuit said: We're not going to
16 address any of these arguments because, as a matter of law, the
17 indictment of this man was legally invalid. So do I think that
18 the fact that Mr. Aleynikov was convicted by a jury that was
19 instructed improperly with respect to a law that doesn't exist,
20 do I think that bears on whether now Mr. Aleynikov should have
21 to be deprived of counsel, and the argument that he has counsel
22 because those fools at Marino, Tortorella & Boyle have already
23 entered an appearance? That would be like saying, you know,
24 this guy can get the public defender, he's not going to be
25 deprived of counsel. Goldman Sachs doesn't get the benefit of

1 that. Either they own the indemnification advancement or they
2 don't.

3 THE COURT: I think we're on the merits with a big M,
4 we're on the irreparable harm and injunctive factors.

5 MR. MARINO: I understand. The question for your
6 Honor today is has Sergei Aleynikov, in the first instance, has
7 he demonstrated the threat of irreparable harm --

8 THE COURT: Let me ask sort of an obnoxious question,
9 and probably not for the first time.

10 MR. MARINO: Just for the first time when no one can
11 really call you on it.

12 THE COURT: Can I find -- can I find, can I find that
13 having to be represented by a CJA attorney, or a public
14 defender, is irreparable harm? What repercussions would that
15 have?

16 MR. MARINO: I think you could find that in the
17 context of a civil suit to enforce a mandatory right of
18 indemnification and advancement --

19 THE COURT: On a Monday in October?

20 MR. MARINO: On any day after they hired him and made
21 him a VP, and subjected him to their by-laws. Yeah, you could
22 say, and these cases are cited in the briefs that we actually
23 filed. It's very clear that courts have found it is
24 irreparable harm to be deprived of counsel of your choice. And
25 so I guess to the extent that Mr. Aleynikov, perhaps he can

1 borrow money. Perhaps he could. Perhaps. Who knows if he
2 qualifies at this point. But my view on this --

3 THE COURT: I understand you're experienced counsel
4 involved in the case and all that stuff.

5 MR. MARINO: I think it would be pretty dramatic to
6 say that it doesn't harm --

7 THE COURT: I understand. It was more of an idle
8 question.

9 MR. MARINO: And I understand the question. I think
10 in this context, the idea that somebody like Aleynikov would
11 not be irreparably harmed by being deprived of us as his
12 lawyers, at this point two years into the process and with
13 everything that's transpired, the idea that that would even be
14 an efficient way to go about it, to have another come in, it
15 doesn't have a lot of heft to it.

16 THE COURT: Okay. And one other sort of nagging
17 question, and nobody should read anything into this, but
18 suppose we get to the point, or suppose hypothetically we got
19 to the point of injunctive relief, how about the bond
20 requirement of Rule 65C?

21 MR. MARINO: He doesn't have the capacity to file a
22 bond.

23 THE COURT: I know he doesn't have the capacity to
24 file a bond.

25 MR. MARINO: He can't do it.

1 THE COURT: Right. So where does that leave us?

2 MR. MARINO: I don't --

3 THE COURT: The rule says I shall order a bond in an
4 amount sufficient to secure the other side in the event we're
5 wrong.

6 MR. MARINO: That's not what the by-laws speak to,
7 they don't speak to security. They speak is his undertaking.

8 THE COURT: And I agree, if you were to ultimately win
9 this case, then that wouldn't be a consideration.

10 MR. MARINO: If I have to post a bond to force them to
11 give me -- the answer is, advancement is typically decided as a
12 final matter on a summary basis for that precise reason. And
13 every case, and we've cited many of them in our briefs, every
14 case that addresses, says the reason for that is, think about
15 it. If you don't decide it summarily, you either have a trial
16 that goes on and now you're fighting to get advancement, and
17 therefore, by definition, being denied it; or you're posting a
18 bond to secure your injunctive relief and therefore being
19 denied. So I think that the answer is, these things are
20 decided summarily for precisely that reason.

21 You know, it's fine for Goldman Sachs to get up and
22 look at these by-laws, and pretend they say something that they
23 just don't say, or pretend that any rational person in
24 Aleynikov's position, or anyone else's position, coming on to
25 join the Goldman family, would believe that they didn't entitle

1 him to relief.

2 I guess I have this question, and we've gone over this
3 4.1. I deep hearing all my arguments. My point on 4.1 is
4 pretty simple. If you want to know what Goldman Sachs meant
5 when they said officer, well certainly when they said it with
6 respect to the Goldman Sachs Group, it included vice president.
7 I can't think of any reason why they would change it. Why
8 would it be different? And if you were going to change it, why
9 would you use the same word? If you look at the word here that
10 I'm referring to, the word is officers. Other officers. It's
11 repeatedly throughout 4.1. They speak of it in terms of
12 including vice president. So why isn't it including a vice
13 president now. And if they didn't want it, wouldn't they have
14 had to say, you know, elsewhere in these by-laws, when we have
15 a title -- like you're looking around to see what an officer
16 means probably. Well, guess what? When I got their by-laws,
17 that's what I did. I looked around for definition of officer.
18 And I'm reading this. And I say well certainly with respect to
19 a corporation, they're very specific there, it would include
20 vice presidents. And yet we get to 6.4, you would think if
21 they're going to use it to mean something different, wasn't it
22 incumbent upon them to tell us that? That's why this is a
23 summary case, your Honor. That's why all this discussion --
24 let's have discovery, and ask Greg Palm his opinion about who
25 ought to be an officer.

1 Let's talk about what the significance in the
2 partnership agreement of the fact that any officer shall have
3 the power to appoint attorneys in fact. We're going to have a
4 case in which while I'm defending an innocent guy for the
5 second time, an exonerated guy. I'm going to be fighting this
6 case out, and taking depositions, and trying to prove that when
7 Goldman Sachs in its by-laws, which obviously can afford and
8 has purchased the very best counsel in the world to draft its
9 corporate documents, they didn't define a critical term. They
10 don't disagree that the term "officer" is the term on which
11 this case turns, but they don't define it.

12 THE COURT: Okay, okay. I think you've ended on a
13 high note. And unless you've got something really pressing, I
14 think we're done here.

15 MR. MARINO: I guess this is what I have that's really
16 pressing. I don't know what it could possibly mean for the
17 draftsman of these by-laws to say that the rights provided by
18 any person, to any person by this by-law shall be enforceable
19 against the corporation by such person, who shall be presumed
20 to have relied upon it.

21 Let me leave your Honor with this question. What the
22 heck did Sergei Aleynikov presume he was relying on? The use
23 of the word "officer", it has a meaning, not only in American
24 Heritage and everywhere else. Not only to do with just
25 corporations, but everywhere that they use the word, vice

1 president is included. They know it. And Mr. Friedrich, he
2 gave a great answer to your question about: How do you
3 indemnify these others permissively? Fabrice Torre was a vice
4 president of the Goldman Sachs company. His money is being
5 advanced, no doubt about it. Neil Morrison was a vice
6 president of the Goldman Sachs company, he's being advanced.
7 I'm going to tell you the test, the legal realism, I'm going to
8 give you the legal realism. Are you ready for the legal
9 realism?

10 THE COURT: I don't know.

11 MR. MARINO: If you mess with us, you steal from us,
12 you offend us, and God forbid you embarrass us, you get your
13 conviction on the very day you argue the appeal, we aren't
14 giving you a nickel. That's our test. It doesn't mean you,
15 Officer. It doesn't mean you. And that isn't right. And
16 that's not how it plays. And honestly, if there were words
17 that I could find to express my level of frustration at reading
18 this document and seeing the way the word "officer" appears,
19 without any definition, but then hearing the many
20 extraordinarily detailed definition that they're able to
21 conjure after the fact in the teeth of a provision that says
22 you're presumed to have relied, I'd express it.

23 THE COURT: Okay. I will take this matter under
24 advisement. It's very complicated and very interesting, I
25 assure everyone that I will not hypothesize on motives on

1 behalf of anyone and/or decide the case on that basis. But I
2 do have the question of interpretation, and I'll be writing on
3 this. And I know better than to promise you a date. I'll do
4 it as quickly as I reasonably can.

5 MR. MARINO: Thank you very much, your Honor.

6 MR. FRIEDRICH: Thank you, Judge.

7 THE COURT: Thank you, counsel,

8 THE CLERK: All rise.

9 (Matter concluded)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

